IN THE

Supreme Court of the United States.

October Term, 1904.

J. B. CARO, J. C. KEYSER, *et al.*
Plaintiffs in Error,
v.
W. H. DAVIDSON, W. E. ANDERSON,
Defendants in Error.

No. 196.

Brief for Plaintiffs in Error in Reply to Motion to Dismiss.

Defendants in error move to dismiss the writ of error bringing the case before this court for want of jurisdiction. In reply we consider the following questions involved that give this court jurisdiction:

I. There was drawn in question by the final judgment of the Supreme Court, whether an authority exercised under the State was not repugnant to that portion of the 14th Amendment of the Constitution of the United States that provides that a person shall not be deprived of his property without due process of law; and also whether a decision in favor of the validity of the statute of a State did not draw in question the validity as being repugnant to this same provision in the 14th Amendment of the Constitution.

The case arises as follows: A motion was made in the Circuit Court of Escambia County, Florida (pp. 3, 4, Rec.), to declare of no force or validity, and null and void, certain interlocutory orders of March 5, 1887, and April 4, 1887, and the perpetual injunction and order of January 17, 1889, appointing one William Fisher as receiver for the Rivas tract of land. The ground for this motion was that at the time of the granting of said interlocutory injunction and said order appointing Fisher as receiver and granting of said alleged injunction and final decree, Judge McClellan, who made the order and rendered the decree, was of kin by affinity to C. C. Young, Sr., a party plaintiff to said cause, having married the sister of the said C. C. Young, Sr., and having at the time of making said orders and rendering said decrees living children the issue of said marriage.

To this objection defendants in error answered:

1. That the final decree made in said cause was appealed by petitioners and others to the Supreme Court of the State of Florida and was examined upon its merits, and a decree rendered by the Supreme Court affirming the final decrees of the said Judge J. F. McClellan.

2. Answering the 4th paragraph. That more than ten years prior to the beginning of this suit the wife of the said Judge McClellan, the sister of the said C. C. Young, Sr., had died (p. 13, Rec.).

To this answer plaintiffs in error demurred (p. 13, Rec.).

On these pleadings the motion was dismissed in the Circuit Court without any opinion being rendered (p. 14, Rec.).

Upon appeal to the Supreme Court of Florida the decree of dismissal was affirmed without any opinion being rendered (p. 19, Rec.).

The following statute law was in force when the orders were made and the decree rendered by Judge McClellan

and when the motion to have same declared null and void was made.

"No judge of any court shall sit or preside in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity or affinity to either of the parties, nor shall he entertain any motion in the cause other than to have the same tried by a qualified tribunal."

Sec. 957, R. S. Fla. p. 354, 1892.

"Any and all judgments, decrees and orders, except an order for the trial of the cause as hereinbefore provided, made by a judge so disqualified, shall be of no force and validity and shall be null and void."

Sec. 970, R. S. Fla. p. 354, 1892.

The following was the law of Florida relative to the qualification of jurors:

"The court shall, on motion of each party in any suit, examine on oath any person who is called as a juror therein to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent to the cause, or is otherwise incompetent, another shall be called and placed in his stead for the trial of that cause."

Sec. 1086, Code of Florida, 1892.

The Supreme Court of Florida has carried the doctrine of the disqualification of a judge through relationship by affinity further than a good many of our State courts have done.

In a well-considered case reviewing the subject at length the Supreme Court has held that a judge will be disqualified when any blood relative of his wife within the ninth degree, or the husband or wife of such relative is the interested party. *State* v. *Wall*, 41 Fla. 463, 467.

In another case wherein was involved the question of a judge having at one time been interested as counsel in a branch of the litigation under consideration, the court discusses very fully the reasons why the disqualification of judges should not be given a narrow and technical construction. *State ex rel.* v. *Hocker*, 34 Fla. 25.

It is a well-settled principle that affinity is a proper ground of challenge to the jury either to the array or to the polls, and that the relationship by affinity continues if there be issue of the marriage. This rule is laid down in the numerous authorities bearing upon the subject cited in the following case by Judge Lumkin of Georgia.

"The general rule is that relationship by affinity is dissolved by the death of either party to the marriage which created the affinity, provided the deceased party left no issue living." Thom. and M. Jur. p. 181; *Dearmond* v. *Dearmond*, 10 Ind. 191;

"Affinity is the principal ground of challenge either to the array or to the polls, and it continues if there shall be issue of the marriage. *Vannoy* v. *Givint*, 23 N. J. Law, 201. See also *Cain* v. *Inghal*, 7 Cow. 478 and note at bottom of p. 479."

Miller v. *State* (Ga. Case), 25 S. E. Rep. 366.

By the statute law of Florida, and from the decisions of its Supreme Court above cited, the orders and decree of Judge McClellan were not voidable, but void.

"In all cases where a court is rendered incompetent to proceed, its proceedings during such incompetency are as invalid as though it had never possessed jurisdiction."

Freeman on Void Judicial Sales, Sec. 7.

Freeman on Judgments, Sec. 146, discusses disabilities of judges prescribed by statute, but in a number of cases the statute law cited is not so strong as the Florida statute, merely prohibiting judges from sitting in causes in

which they are related by consanguinity or affinity, without declaring, as Sec. 970 R. S. of Florida does, that decrees and orders rendered by them shall be null and void. The section treats of the inadvisability of permitting a judge even by consent to act where there may be a suspicion of interest, and says:

"But the general effect of the statutory prohibitions in the several States is undoubtedly to change the rule of the common law so far as to render those acts of a judge, involving the exercise of judicial discretion, in a case where he is disqualified from acting, not voidable merely, but void."

Freeman on Judgments, Sec. 146.

By answer of defendants in error it is claimed that the appeal from this decision to the Supreme Court of Florida gave validity to this null and void judgment. On page 2 of the brief of defendants in error on their motion to dismiss, it is stated:

"Many cases hold that an appeal from the circuit court of chancery to the Supreme Court, vacates the decree below, and the Supreme Court deals with the case as a new one," citing authorities.

We have carefully examined these authorities and can find nothing in them to justify such a claim. The first case cited to sustain the proposition lays down a rule which none of the other cases show any departure from—that "if counsel shall for the first time raise a point here (in the Supreme Court) which might not have been obviated had it been made in the court below, he ought not to be permitted to do so."

Southern Life Insurance and Trust Co. v. *Cole*, 4 Fla. 363.

The fifth section of the Petition in the Circuit Court for Escambia County (p. 4, Rec.), shows that your plaintiffs

in error did not know at the time that Judge McLellan rendered his decree of the relationship that existed between C. C. Young, Sr., and himself, and did not know it until after the case had been decided by the Supreme Court. The question therefore was never raised before Judge McLellan, and under the decision we have just cited could not for the first time have been raised in the Supreme Court of Florida, and it was not actually raised there, as will appear from the decision of that court in the case. *Wilkins* v. *Davidson*, 36 Fla. 36.

Furthermore, the Constitution of the State of Florida expressly limits the Supreme Court to appellate jurisdiction in all cases at law and in equity originating in circuit courts.

Sec. 5, Art. 5, Constitution of Florida. See Revised Statutes of Florida, p. 55.

It would indeed be strange if a supreme court by the same act whereby it affirmed the decree of the lower court, could vacate that decree for the purpose of giving validity to what was a nullity and absolutely void.

The affirmation of the Supreme Court of Florida of the decree of Judge McLellan could not make that decree valid.

"A void judgment is in legal effect no judgment, by it no rights are divested, from it no rights can be obtained, being worthless in itself, *all proceedings founded upon it* are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void."

Freeman on Judgments, Sec. 117.

"Void judgments are mere nullities and may be safely ignored by those whose rights are attempted to be affected thereby."

11 American Decisions, Note on p. 755.

The record brought to this court clearly presents the

question that the decree of Judge McLellan was null and void, because of lack of jurisdiction in the court to render that decree. Without jurisdiction in the court no decree is due process of law, and we do not believe that defendants in error would contend that this court is without jurisdiction because of the record failing to show that there was drawn in question the depriving a person of his property without due process of law, prohibited by the 14th Article of the Constitution of the United States. The objection made to the jurisdiction of this court (pp. 3 and 4 of defendants in error's brief) is directed solely to another point, viz: that the record fails to show that the Supreme Court decided the validity of an *ex post facto* law of the State in repugnancy to the Federal Constitution.

"The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the State, whether through its legislative, its executive or its judicial authorities. *Ex parte Virginia* (*'Virginia* v. *Rivas'*), 100 U. S. 313, 318, 319 (25: 667, 669); *Ex parte Virginia*, 100 U. S. 339, 346 (25: 676, 679); *Neal* v. *Delaware*, 103 U. S. 370, 397 (26: 567, 574). And the first one, as said *Chief Justice* Waite in *United States* v. *Cruikshank*, 92 U. S. 542, 554 (23: 588, 592), repeating the words of *Mr. Justice* Johnson in *Bank of Columbia* v. *Okely*, 17 U. S. 4 Wheat. 235, 244 (4: 559, 561); was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'

"Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that

court's construction of a statute of the territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this court must decide for itself the true construction of the statute. *Huntington* v. *Attrill*, 146 U. S. 657, 683, 684 (36 : 1123, 1133); *Mobile & O. R. Co.* v. *Tennessee*, *ante*, p. 793.

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

Scott v. *McNeal*, 154 U. S. 45, 46.

"Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

Pennoyer v. *Neff*, 95 U. S. 715.

II. That by a necessary intendment there was drawn into question an Act of the General Assembly of Florida, approved May 30, 1901, repugnant to Sec. 10, Article I of the Constitution of the United States, by reason of its being an *ex post facto* law, as applicable to the judgments of the said J. F. McClellan.

The transcript of the Circuit Court of Florida setting out the petition already referred to, and the pleadings thereto, were filed in the Supreme Court of the State of Florida January 3, 1901, (p. 1, Rec.). Subsequently, but previous to submission of the case to the Supreme Court the Legislature of Florida on May 30, 1901, passed the following act:

"*Be it enacted by the Legislature of the State of Florida:*

"SECTION 1. That Section 970, of the Revised Statutes of the State of Florida, be, and is, hereby amended to read as follows:

"SECTION 970. EFFECT OF HIS ACTION. Any and all judgments, decrees and orders heretofore or hereafter rendered in the causes where the disqualifications appear of record in the cause, shall be void, but where the disqualification does not so appear, they shall not be subject to collateral attack."

Acts of Legislature, 1901, p. 39.

The status of the matter plainly is this: That after the institution of proceedings to set aside this judgment, and after the case had been appealed to the Supreme Court, but before the case was heard there, the Legislature was prevailed upon to amend Sec. 970 as above set forth. The amendment was clearly aimed to reach this case by *ex post facto* legislation. The case was then pending. Judge McClellan had been disqualified, the disqualification did not appear of record, and this legislation provided that

all decrees and orders *heretofore* as well as hereafter rendered, should not be subject to collateral attack, unless the disqualification appeared of record. There is, as the court will readily see, good reason why mention is not made of this act in the record, the act not having been passed until after the record for the appeal was filed in the Supreme Court of Florida. The act presents a question of whether it is not *ex post facto*, in so far as it might shelter from collateral attack the decrees and orders of Judge McClellan, which were void at the time rendered. The act was carefully and ingeniously drawn. The petition is based on section 970, and that section, before the petition is heard by the Supreme Court, is carefully wiped out and for it is substituted an amendment making Section 970 read entirely anew, and read in such away that if sustained as a valid statute plaintiffs in error would be deprived of the remedy sought to be invoked by their petition.

The petition is dismissed without an opinion, and under this state of circumstances defendants in error say (p. 3, brief):

"That the act of 1901 is not to be found adverted to in the record, and can not for the purposes of the jurisdiction of this court be imported into it,"—

citing the case of *Powell* v. *Brunswick Co.*, 150 U. S. 440. But in this same case, p. 440, the court states:

"If it appear from the record by clear and necessary intendment that a federal question must have been directly involved, so that the said court could not have given judgment without deciding it, that will be sufficient."

Mr. Justice Washington laid down the following rule for the construction of the 25th Section of the Judicial Act of 1789:

"Questions of this nature have frequently occurred in this court, and have given occasion for a critical examination of the above section, which has resulted in the adoption of certain principles of construction applicable to it, by which the objection now to be considered may, without much difficulty, be decided. (2 Wheaton, 363; 4 Wheaton, 311; 12 Wheaton, 117.) One of those principles is, that if it sufficiently appear from the record itself, that the repugnancy of a statute of a State to the Constitution of the United States was drawn into question, *or that that question was applicable to the case*, this court has jurisdiction of the cause under the section of the act referred to; although the record should not, in terms, state a misconstruction of the Constitution of the United States, or that the repugnancy of the statute of the State to any part of that constitution was drawn into question."

Satterlee v. *Matthewson*, 2 Pet. 409, 410.

The question we conceive was applicable to the case here.

"It is true the court of appeals in its opinion only incidentally refers to statutes passed subsequent to the act of 1871, and places its decision distinctly on the ground that that act was void in so far as it related to the coupon contract, but at the same time it is equally clear that the judgment *did give effect to the subsequent statutes*, and it has been repeatedly held by this court that in reviewing the judgment of the courts of a State we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision.

"* * * Suppose, further, that this court should hold that the first statute was valid and broad enough to exempt from all taxation, city as well as State, and adjudge the last act of the legislature void as in conflict with the prior; and that thereafter the city should again attempt to levy taxes upon the corporation, and that upon a challenge of those taxes, the State court should say nothing in respect to the last act, but simply rule that the original act exempting the property of the corporation from taxation was void, could it fairly be held that

this court was without jurisdiction to review that judgment, a judgment which directly and necessarily operated to give force and effect to the last statute subjecting the property to city taxes? Could it be said that the silence of the State court in its opinion changed the scope and effect of the decision? In other words, can it be that the mere language in which the State court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a State court to determine our jurisdiction. Such, certainly, has not been the understanding, and such certainly would seem to set at naught the purpose of the Federal Constitution to prevent a State from nullifying by its legislation a contract which it has made or authorized to be made."

McCulloch v. *Virginia*, 172 U. S. 116, 117.

While the court rendered no opinion, when it acted the amendment of May 30, 1901, had become section 970, and by that amendment section 970 was repealed *in toto*. Therefore, can it be fairly said that the decision gave no effect to this subsequent statute?

"It would be a new rule of pleading and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant, in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'this paragraph of the Constitution is the one involved in this case.'"

Bridge Proprietors v. *Hoboken L. and I. Co.* 1 Wall. 142.

"It is enough for the purposes of this suit to say, that a cause can be removed from a State court into this court

under the 25th section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him, was denied to him by the State court. It is urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in its application to their case, should be contained in the pleadings, but this is in no case necessary. If the record shows, either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, then the jurisdiction of this court attaches."

Furman v. *Nichol*, 8 Wall. 56.

Conclusion.

In addition to the arguments made and authorities cited showing why this court has jurisdiction, we beg to suggest for its information, that the case of *Florida McGuire, et al.* v. *W. A. Blount, et al.* No. 134, now before this court, contains a complete record of the claim and contention of both sides, with the records of title and evidence, both oral and written, and included therein is this decree of Judge McClellan, enjoining the plaintiffs in error here and appointing William Fisher, the agent of C. C. Young, Sr., receiver. The decree is therefore now within the jurisdiction of this court for its determination as to whether the same is void, and the question presented in this present case, No. 194, is the validity of this same decree.

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January 12, 1905.